

ESTTA Tracking number: **ESTTA746573**

Filing date: **05/16/2016**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	DC COMICS
Granted to Date of previous extension	05/18/2016
Address	2900 West Alameda Avenue Burbank, CA 91505 UNITED STATES
Attorney information	James D. Weinberger Fross Zelnick Lehrman & Zissu, P.C. 866 United Nations Plaza 6th Floor New York, NY 10017 UNITED STATES jweinberger@fzlz.com, lkittay@fzlz.com Phone:(212) 813-5900

Applicant Information

Application No	86762720	Publication date	01/19/2016
Opposition Filing Date	05/16/2016	Opposition Period Ends	05/18/2016
Applicant	PERFORMANCE BRANDS, INC. 905 Shotgun Road Sunrise, FL 33326 UNITED STATES		

Goods/Services Affected by Opposition

Class 003. First Use: 0 First Use In Commerce: 0 All goods and services in the class are opposed, namely: Cosmetic preparations for slimming purposes; Cosmetic preparations, namely, firming creams; Cosmetic preparations, namely, firming lotions; Lotions for cellulite reduction; Skin and body topical lotions, creams and oils for cosmetic use
Class 005. First Use: 0 First Use In Commerce: 0 All goods and services in the class are opposed, namely: Dietary and nutritional supplements

Grounds for Opposition


Priority and likelihood of confusion	Trademark Act Section 2(d)
Dilution by blurring	Trademark Act Sections 2 and 43(c)
Dilution by tarnishment	Trademark Act Sections 2 and 43(c)

Marks Cited by Opposer as Basis for Opposition


U.S. Registration No.	1433864	Application Date	08/28/1986
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Registration Date	03/24/1987	Foreign Priority Date	NONE
Word Mark	THE MAN OF STEEL		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 016. First use: First Use: 1986/06/17 First Use In Commerce: 1986/06/17 COMIC MAGAZINES		

U.S. Registration No.	2226436	Application Date	08/03/1995
Registration Date	02/23/1999	Foreign Priority Date	NONE
Word Mark	MAN OF STEEL		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 028. First use: First Use: 1995/10/00 First Use In Commerce: 1995/10/00 toys, namely, toy vehicles, hand held unit for playing electronic games, video game cartridges, video game cassettes, and playground balls		

U.S. Registration No.	4419423	Application Date	05/30/2012
Registration Date	10/15/2013	Foreign Priority Date	NONE
Word Mark	MAN OF STEEL		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 009. First use: First Use: 2013/05/00 First Use In Commerce: 2013/05/00 MOTION PICTURE FILMS FEATURING COMEDY, DRAMA, ACTION, ADVENTURE AND/OR ANIMATION, AUDIO VIDEO DISCS, AND DIGITAL VERSATILE DISCS FEATURING MUSIC, COMEDY, DRAMA, ACTION, ADVENTURE, AND/OR ANIMATION; CD PLAYERS; COMPACT DISC PLAYERS; RADIOS; MOUSE PADS; EYEGLASSES, SUNGLASSES AND CASES THEREFOR; COMPUTER GAME SOFTWARE FOR USE ON MOBILE AND CELLULAR PHONES; VIDEO AND COMPUTER GAME PROGRAMS; DOWNLOADABLE AUDIO-VISUAL MEDIA CONTENT IN THE FIELD OF ENTERTAINMENT FEATURING ANIMATED MOTION PICTURES; DOWNLOADABLE ELECTRONIC PUBLICATIONS IN THE NATURE OF BOOKS IN THE FIELD OF CHARACTERS FROM ANIMATED, ACTION ADVENTURE, COMEDY AND/OR DRAMA FEATURES; CELLULAR TELEPHONE ACCESSORIES, NAMELY, HANDS-FREE DEVICES, WIRED AND WIRELESS EAR BUDS AND EAR PHONES,		

	SPEAKERSAND MICROPHONES FOR USE WITH CELLULAR TELEPHONES; CELLULAR TELEPHONE COVERS ANDCELLULAR TELEPHONE FACE COV- ERS; AND DECORATIVE MAGNETS
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U.S. Registration No.	4419425	Application Date	05/30/2012
Registration Date	10/15/2013	Foreign Priority Date	NONE
Word Mark	MAN OF STEEL		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 016. First use: First Use: 2013/04/00 First Use In Commerce: 2013/04/00 PRINTED MATTER AND PAPER GOODS, NAMELY,BOOKS FEATURING CHARACTERS FROM ANIMATED, ACTION ADVENTURE, COMEDY AND/OR DRAMAFEATURES, COMIC BOOKS, GRAPHIC NOVELS, CHILDREN'S BOOKS, MAGAZINES FEATURING CHARACTERS FROM ANIMATED, AC- TION ADVENTURE, COMEDY AND/OR DRAMA FEATURES, COLORING-BOOKS, CHILDREN'S ACTIVITY BOOKS; STATIONERY, WRITING PAPER, NOTEBOOKS, DIARIES, NOTE CARDS, GREETING CARDS, TRADING CARDS; LITHOGRAPHS; PENS, PENCILS, CASES THEREFOR, ERASERS; DECALS, STICKERS; POSTERS; ADHESIVE PLASTIC FILM WITH REMOV- ABLE PAPER FOR MOUNTING IMAGES FOR DECORATIVE PURPOSES; MOUNTED AND/OR UNMOUNTED PHOTOGRAPHS; BOOKMARKS, CALEN- DARS, GIFT WRAPPING PAPER; PAPER PARTY FAVORS AND PAPER PARTY DECORATIONS, NAMELY, PAPER NAPKINS, PRINTED INVITA- TIONS, PAPER TABLECLOTHS, PAPER CAKE DECORATIONS		

U.S. Registration No.	4522572	Application Date	05/30/2012
Registration Date	04/29/2014	Foreign Priority Date	NONE
Word Mark	MAN OF STEEL		
Design Mark			
Description of	NONE		

Mark	
Goods/Services	Class 025. First use: First Use: 2002/00/00 First Use In Commerce: 2002/00/00 CLOTHING FOR MEN, WOMEN AND CHILDREN, NAMELY, SHIRTS, T-SHIRTS, SWEATSHIRTS, JOGGING SUITS, PANTS, SHORTS, TANK TOPS, RAINWEAR, CLOTH BABY BIBS, SWEATERS, JACKETS, COATS, RAIN-COATS, ROBES, HATS, CAPS, SUN-VISORS, GLOVES, BELTS, SLEEP-WEAR, PAJAMAS, LINGERIE, UNDERWEAR, BOOTS, SHOES, SNEAKERS, SANDALS, SOCKS, BOOTIES, SLIPPER SOCKS, SWIMWEAR, AND MAS-QUERADE AND HALLOWEEN COSTUMES AND MASKS SOLD IN CONNEC-TION THEREWITH; LEATHER BELTS; PLASTIC BABY BIBS; ALL OF THE FOREGOING USED IN CONNECTION WITH A FICTIONAL CHARACTER AND RELATED INDICIA

U.S. Registration No.	4411861	Application Date	05/30/2012
Registration Date	10/01/2013	Foreign Priority Date	NONE
Word Mark	MAN OF STEEL		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 028. First use: First Use: 2013/04/00 First Use In Commerce: 2013/04/00 ACTION FIGURES AND ACCESSORIES THEREFOR; PLAYSETS FOR AC-TION FIGURES; PLUSH TOYS; BALLOONS; TOY VEHICLES; DOLLS; FLY-INGDISCS; GAME EQUIPMENT SOLD AS A UNIT FOR PLAYING A BOARD GAME, A CARD GAME, A MANIPULATIVE GAME, A PARLOR GAME AND AN ACTION TYPE TARGET GAME; SKATEBOARDS; BALLS, NAMELY, PLAY-GROUND BALLS; AND CHRISTMAS TREE ORNAMENTS		

Attachments	85638965#TMSN.png(bytes) 85638980#TMSN.png(bytes) 85638985#TMSN.png(bytes) 85638993#TMSN.png(bytes) Notice of Opposition MAN OF STEEL.PDF(63760 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/s/ James D. Weinberger
Name	James D. Weinberger

Date	05/16/2016
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

DC COMICS,

Opposer,

-against-

PERFORMANCE BRANDS, INC.,

Applicant.

NOTICE OF OPPOSITION

Opposer, DC Comics, a New York partnership located at 2900 W. Alameda Ave., Burbank, California 91505, believes that it would be damaged by registration of the trademark MAN OF STEEL applied for in Application Serial No. 86/762,720, filed September 21, 2015 (the “Application”), for goods in International Classes 3 and 5 by Performance Brands, Inc. (“Applicant”).

As grounds therefore, Opposer alleges as follows:

1. DC Comics and its predecessors-in-interest (collectively “DC Comics”) is the publisher of comic books and magazines featuring comic characters and stories, including the world-famous character Superman. DC Comics is among the most well known and successful publishers of comic magazines in the world. It has created and published highly successful and well-known characters, including Superman.

2. Over the many years since the Superman character was first introduced in 1938, DC Comics has focused an enormous amount of attention and effort to develop the Superman character, including the indicia associated with him. Throughout the period of Superman’s existence, DC Comics has invested a vast amount of creative energy and resources to continually

update and improve the Superman property to keep the character and his adventures timely and fresh in the public's mind. Opposer's efforts in this regard have led to a vast array of literary works, television series, and feature films, which explore in great depth Superman himself and the fictional world inhabited by him. Due to Opposer's extraordinary nurturing of the Superman character, the character has captured the popular imagination, and it is beyond dispute that today Superman is one of a rarified group of characters known and loved throughout the world.

3. Because of DC Comics' shepherding and careful development of the Superman character, Superman has become associated with certain symbols and indicia which, in the public mind, are inextricably linked with the Superman character and which function as trademarks, both for literary and entertainment works featuring Superman and related characters and for various goods and services for which Opposer has licensed others to use these marks. Among these indicia is Superman's famous nickname MAN OF STEEL ("Opposer's Mark"). The first use of this moniker in connection with Superman dates back to November 1938.

4. Moreover, DC Comics and its licensee Warner Bros. Entertainment Inc. released a nationwide *Superman* major motion picture in 2013 entitled *Man of Steel*. The production received considerable media attention and the film was shown in movie theaters across the world.

5. Opposer is the owner of all right, title, and interest in and to Opposer's Mark in connection with a vast array of goods and services based on first use in commerce prior to any date upon which Applicant can rely, including but not limited to comic books, motion pictures, clothing, toys, video games, books, lunch boxes and water bottles.

6. As a result of Opposer's reputation, use, enormous sales success and significant investment in advertising, Opposer's Mark has developed secondary meaning and significance in the minds of the public and has become a strong trademark identifying Opposer's products

exclusively. As such, Opposer's Mark represents an enormous goodwill and is an extremely valuable to Opposer.

7. As a result of Opposer's reputation, use, substantial sales success, inestimable popularity, and significant investment in advertising, Opposer's Mark has become a famous trademark and became famous prior to any date upon which Applicant can rely.

8. Opposer owns U.S. trademark registrations for Opposer's Mark and related marks in connection with goods and services including those relating to entertainment, publications, toys, paper products, clothing and related goods and services, including, but not limited to, the following:

- THE MAN OF STEEL, U.S. Reg. No. 1,433,864, registered March 24, 1987, based on first use in interstate commerce in June 1986, for "comic magazines" in International Class 16;
- MAN OF STEEL, U.S. Reg. No. 2,226,436, registered February 23, 1999, based on first use in interstate commerce in October 1995, for "toys, namely, toy vehicles, hand held unit for playing electronic games, video game cartridges, video game cassettes, and playground balls" in International Class 28;
- MAN OF STEEL, U.S. Reg. No. 4,419,423, registered October 15, 2013, based on first use in commerce in interstate commerce in May 2013 for "motion picture films featuring comedy, drama, action, adventure and/or animation, audio video discs, and digital versatile discs featuring music, comedy, drama, action adventure and/or animation; CD players; compact disc players; radios; mouse pads; eyeglasses; sunglasses and cases therefor; computer game software for use on mobile and cellular phones; video and computer game programs; downloadable audio-visual media content in the field of entertainment featuring animated motion pictures;

- downloadable motion pictures; downloadable electronic publications in the nature of books in the field of characters from animated, action adventure, comedy and/or drama features; cellular telephone accessories, namely hands-free devices, wired and wireless ear buds and hear phones, speakers and microphones for use with cellular telephones; cellular telephone covers and cellular telephone face covers; and decorative magnets” in International Class 9;
- MAN OF STEEL, U.S. Reg. No. 4,419,425, registered on October 15, 2013 based on first use in interstate commerce in April 2013, for “printed matte and paper goods, namely, books featuring characters from animated, action adventure, comedy and/or drama features, comic books, graphic novels, children’s books, magazines featuring characters from animated, action adventure, comedy and/or drama features, coloring books, children’s activity books; stationery, writing paper, notebooks, diaries, note cards, greeting cards, trading cards; lithographs; pens, pencils, cases therefor, erasers; decals, stickers; posters; adhesive plastic film with removable paper for mounting images for decorative purposes; mounted and/or unmounted photographs; bookmarks, calendars, gift wrapping paper; paper party favors and paper party decorations, namely, paper napkins, printed invitations, paper tablecloths, paper cake decorations” in International Class 16;
 - MAN OF STEEL, U.S. Reg. No. 4,522,572, registered on April 29, 2014, based on first use in interstate commerce in 2002, for “clothing for men, women and children, namely, shirts, t-shirts, sweatshirts, jogging suits, pants shorts, tank tops, rainwear, cloth baby bibs, sweaters, jackets, coats, raincoats, robes, hats, caps, sun-visors, gloves, belts, sleepwear, pajamas, lingerie, underwear, boots, shoes, sneakers, sandals, socks, booties, slipper socks, swimwear, and masquerade and Halloween

costumes and masks sold in connection therewith; leather belts; plastic baby bibs; all of the foregoing used in connection with a fictional character and related indicia” in International Class 25; and

- MAN OF STEEL, U.S. Reg. No. 4,411,861, registered on October 1, 2013, based on first use in interstate commerce in April 2013, for “action figures and accessories therefor; playsets for action figures; plush toys; balloons; toy vehicles; dolls; flying discs; game equipment sold as a unit for playing a board game, a card game, a manipulative game, a parlor game and an action type target game; skateboards; balls, namely playground balls; and Christmas tree ornaments” in International Class 28.

The registrations for Opposer’s Mark relied upon herein are valid, subsisting and in full effect and serve as prima facie evidence of the validity of the mark and of Opposer’s exclusive right to use the mark in connection with the goods and services identified therein, pursuant to Section 33(b) of the Lanham Act, 15 U.S.C. § 1115(a). Additionally, U.S. Reg. Nos. 1,433,864 and 2,226,436 have become incontestable under Section 15 of the Lanham Act, 15 U.S.C. § 1065, and therefore serve as conclusive proof of Opposer’s exclusive right to use the marks contained therein in connection with the goods and services identified therein, as provided by Section 33(b) of the Lanham Act, 15 U.S.C. § 1115(b).

9. Upon information and belief, Applicant is a Florida corporation with a place of business at 905 Shotgun Road, Sunrise, Florida 33326.

10. On September 21, 2015, Applicant filed the Application for “Cosmetic preparations for slimming purposes; Cosmetic preparations, namely firming creams; Cosmetic preparations, namely, firming lotions; Lotions for cellulite reductions; Skin and body topical lotions, creams and oils for cosmetic use” in International Class 3 and “Dietary and nutritional

supplements” in International Class 5, based on an intent to use the mark, pursuant to Section 1(b) of the Lanham Act, 15 U.S.C. § 1051(b) (the “Applicant’s Mark”).

11. Applicant’s Mark is identical to Opposer’s MAN OF STEEL mark in sight, sound, and commercial impression.

12. In view of the strength and breadth of use of Opposer’s Mark, Applicant’s goods to be offered under Applicant’s Mark are sufficiently related to goods and services sold under Opposer’s Mark and, upon information and belief, will be sold to the same customers or types of customers to whom goods and services bearing Opposer’s Mark are to be sold.

13. Based on the identity of the marks and the relatedness of the goods, consumers are likely to be deceived into falsely believing that the goods offered by Applicant under Applicant’s Mark originate from or are otherwise associated with, licensed by or endorsed by Opposer, or that there is some relationship between Applicant and Opposer or the goods of Applicant and Opposer, all to Opposer’s injury and harm.

14. Thus, registration of Applicant’s Mark in connection with the goods set forth in the Application is likely to cause confusion, cause mistake, or to deceive the public into the false belief that the goods offered by Applicant under Applicant’s Mark come from or are otherwise sponsored by or connected with Opposer, in violation of Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d).

15. Moreover, Opposer’s Mark is famous for goods and services relating to publications and entertainment, and became famous long before the earliest priority date upon which Applicant can rely. Because Opposer’s Mark has become famous, Applicant’s use and registration of Applicant’s Mark will damage Opposer by trading on the enormous goodwill associated with Opposer’s Mark and diluting its distinctiveness. Thus, Applicant’s use and registration of Applicant’s Mark in connection with the goods identified in the Application are

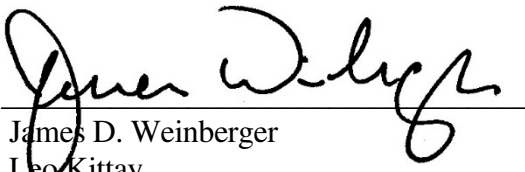
likely to cause dilution by blurring and tarnishment of the famous Opposer's Mark, in violation of Sections 13(a) and 43(c) of the Lanham Act, 15 U.S.C. §§ 1063(a), 1125(c).

16. By reason of the foregoing, Opposer is likely to be harmed by the registration of the Application.

THEREFORE, it is respectfully requested that this Opposition be sustained and that registration of the mark shown in the Application be refused in its entirety.

Dated: New York, New York
May 16, 2016

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

By: 
James D. Weinberger
Leo Kittay

866 United Nations Plaza
New York, New York 10017

Tel: (212) 813-5900

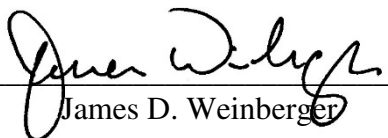
Email: jweinberger@frosszelnick.com
lkittay@frosszelnick.com

Attorneys for Opposer

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **NOTICE OF OPPOSITION** was sent by first class mail postage pre-paid to Applicant's Correspondent of Record, this 16th day of May, 2016, to the following:

PERFORMANCE BRANDS, INC.
Performance Brands Inc
905 Shotgun Rd
Sunrise, Florida 33326-1983


James D. Weinberger